United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be argued by
STEPHEN F. SCHINDEL

76-7469

United States Court of Appeals

FOR THE SECOND CIRCUIT

PRATT & WHITNEY, Division of
UNITED AIRCRAFT CORPORATION,

Plaintiff-Appellant,

—against—

BURLINGTON NORTHERN, INC.,

Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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-against-

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BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

Plaintiff appeals from a Judgment of the United States District Court for the Southern District of New York (Owen, J.) which: 1) denied plaintiff's motion for Summary Judgment; 2) granted defendant's motion for Summary Judgment; and 3) dismissed plaintiff's action as time-barred. (43).

QUESTIONS PRESENTED

This case deals with the limitation on suits set forth in Section 2(b) of the Uniform Bill of Lading Contract. This provision was authorized by Section 20(11) of the Interstate Commerce Act, Title 49 U.S.C.A. §20(11), and provides that suit may be instituted against the carrier only within two years and one day from the day when notice in writing has been given to the claimant that the carrier has disallowed the claim. The questions presented for decision are: 1) whether a carrier, having declined a claim, may withdraw or revoke its declination, thereby stopping the running of the limitation period, and 2) whether such a withdrawal or revocation was effected in this case.

In the instant case the carrier had declined plaintiff's claim on an invalid ground. (29). The plaintiff protested, and the carrier later advised the plaintiff that this particular claim was removed from its open claim account in error. (35). Because of this advice and other statements by the carrier, the plaintiff was led to believe that its claim was still open, and forebore from instituting suit on this claim. More than two years later, without ever again having stated that the claim was declined, the carrier notified the plaintiff

that the two-year period had run from the date of the original declination, and that the carrier was declining payment of plaintiff's claim on that ground. (40).

The District Court disposed of the case by characterizing the first declination letter as an unequivocal declination which started the running of the limitation period, which period could not be stopped by negotiations between the parties. The District Court did not address the major issue raised by plaintiff: whether a carrier may withdraw or revoke a declination, thereby stopping the running of the limitation period.

Plaintiff contends that the District Court erred in failing to discuss this issue of revocation, and in failing to hold that the carrier had in the instant case withdrawn or revoked its declination, thereby stopping the running of the limitation period. Plaintiff therefore contends that the District Court's holding that this action was time-barred and should be dismissed was erroneous and should be reversed.

FACTS

On August 7, 1968, plaintiff prepared a Bill of Lading (26) covering the transportation of two skids of electric generators and five boxes of motor parts from Electric

Machinery Manufacturing Company, Minneapolis, Minnesota, to Western Massachusetts Electric Company, West Springfield, Massachusetts, via Chicago, Burlington & Quincy Railroad ("C B & Q") and Penn Central Railroad Company ("Penn Central"). The shipment was accepted for transportation by C B & Q on August 7, 1969.

On or about August 13, 1968, this shipment was damaged by fire while en route. C B & Q inspected the shipment on August 21, 1968. On August 23, 1968, plaintiff filed a damage claim against Penn Central for the damage sustained by this shipment.

Penn Central declined the claim on January 20, 1970. (29). On January 30, 1970, plaintiff questioned the grounds of the declination. (30). On June 11, 1970, Penn Central responded: "Claim is under investigation and we are tracing today for additional information before we can conclude our handling." (31).

On December 22, 1970, Penn Central advised plaintiff: "Claim is presently with our Legal Department. We are tracing for immediate return and I will contact you further." (32).

On June 1, 1971, plaintiff received a computerized

"Statement of Claim Account" from Penn Central. (33). This statement did not include the subject claim.

Plaintiff wrote to Penn Central on June 4, 1971, stating: "We might point out that your claim statement account dated May 25, 1971 does not show this claim as outstanding, and we ask why this is so." (34).

In response to this letter, Penn Central wrote plaintiff on June 14, 1971, stating in part: "Claim was withdrawn from open account in error. File is still with our Legal Department. We will finalize within 30 days." (35).

Subsequently, plaintiff wrote several letters to Penn Central requesting the status of its claim. Penn Central replied on July 3, 1972, stating: "... we have urgently requested the return of the papers from our Mr. Zinger, Ass't. General Counsel, and on receipt will advise you." (38).

On March 12, 1973, because Penn Central was involved in reorganization proceedings, plaintiff's counsel wrote to C B & Q as the originating carrier of this shipment and issuer of the Bill of Lading, requesting payment of claimant's claim under Section 20(11) of the Interstate Commerce Act. (39).

At some time between the date of the shipment in question and July 10, 1973, defendant Burlington Northern, Inc., became

successor to the interests of C B & Q. On July 10, 1973, defendant wrote to plaintiff's attorneys declining plaintiff's claim on the ground that more than two years had elapsed since the claim had been declined. (40).

This action was commenced in the United States District Court for the Southern District of New York on May 1, 1974. (3).

OPINION BELOW

In a memorandum opinion dated January 12, 1976, Judge Richard Owen denied plaintiff's motion for Summary Judgment and granted defendant's cross-motion, dismissing the action as time-barred. Judge Owen held that Penn Central's declination of January 20, 1970 was an unequivocal disallowance of plaintiff's claim, which started the running of the two-year limitation period. Judge Owen based his holding on several Courts of Appeals decisions: B. A. Walterman Co. v. Pennsylvania Railroad Company, 295 F. 2d 627 (6th Cir. 1961) and Burns v. Chicago St. P. & P.R.R. Co., 192 F. 2d 472 (8th Cir. 1951). Judge Owen declined to follow John Morrell & Co. v. Chicago, Rock Island & Pacific Railroad Company, 495 F. 2d 331 (7th Cir. 1974).

POINT I

THE COURT BELOW ERRED IN FAILING TO FIND THAT THE DECLINATION WAS WITHDRAWN OR REVOKED, THEREBY STOPPING THE RUNNING OF THE LIMITATION PERIOD; PLAINTIFF'S ACTION IS NOT TIME-BARRED.

The District Court held that the declination letter in the instant case was an unequivocal declination which started the running of the limitation period, and that subsequent negotiations did not stop the running of this period. (42). In so holding, the Court did not address a major issue raised by plaintiff's brief which plaintiff feels should be dispositive of this case.

The learned District Court Judge addressed himself only to the issue of whether the declination in the case at bar was an unequivocal or a qualified declination, and failed to deal with the issue of whether an invalid declination could be withdrawn or revoked by the carrier.

Assuming arguendo that the declination was an unequivocal one, it is plaintiff's contention that Penn Central, by its letter of June 14, 1971, withdrew or revoked such declination, stopping the running of the statutory period. (35).

Plaintiff does not disagree with the many cases holding that mere correspondence or negotiations do not stop or

extend the running of the limitation period, and in this respect plaintiff cannot disagree with the opinion below. However, plaintiff contends that the opinion below, insofar as it relates to mere correspondence or negotiations, is inapplicable to the facts of the case. Penn Central's conduct in this case amounted to more than mere correspondence or negotiations, and for that reason the cases relied upon by the District Court Judge are not controlling here.

There is nothing in the Interstate Commerce Act or the case law that prohibits a carrier from withdrawing or revoking its declination of a claim when it doubts the justice of its refusal. Plaintiff contends that such a withdrawal or revocation occurred in this case; that said withdrawal or revocation, as distinguished from mere correspondence or negotiations, had the effect of stopping the running of the limitation period; that plaintiff relied in good faith on the carrier's withdrawal or revocation, and forebore from instituting suit on the claim only to later be surprised by the assertion of the defendant that the limitation period of two years had never stopped running and plaintiff's action was time-barred. (40).

The facts of the case support the foregoing interpretation, i.e. that the declination was withdrawn or revoked by the carrier. The claim was declined on January 20, 1970. (29). Plaintiff took issue with the declination on January 30, 1970. (30). In June 1971, when the claim did not appear as "open on the carrier's claim account statement, its status was questioned by plaintiff. (34). Plaintiff was thereupon advised that "claim was withdrawn from open account in error. File is still with our Legal Department. We will finalize within 30 days." (35).

This was not mere "correspondence". It was not "negotiations". The carrier simply stated that the subject claim had been withdrawn from the carrier's open account in error, i.e. the claim was still open. And, as if to reinforce its open status, the carrier further stated that it would "finalize within 30 days." Having sent this letter, how can the carrier, or its successor in interest, assert in good faith that this claim was closed or that its declination was final? If the claim had in fact been declined, this declination had obviously been revoked or withdrawn by the carrier, for the carrier had effectively stated on June 14, 1971 that the claim was still open. It is for this reason

that the cases holding that mere correspondence or negotiations do not stop the running of the limitation period, are not controlling here.

Had the carrier responded on June 14, 1971 that there was no error and that the claim did not appear on the statement of open claims because it had been declined and was therefore closed, plaintiff would have had seven months to instituted a legal action within the two year limitation period. However, on the basis of the carrier's statement that the claim had been withdrawn from its open account in error, i.e. was still open, plaintiff forebore from instituting suit. Plaintiff would have been ill-advised to sue the carrier while the carrier was, by its own admission, reconsidering the question of its liability for the claim.

Having been advised that its claim was not declined, plaintiff did not sue on the claim, but continued to press the carrier for a resolution.

After Penn Central became embroiled in reorganization proceedings, plaintiff followed up its claim with the Chicago, Burlington & Quincy Railroad, the originating carrier which would be jointly liable with Penn Central under Section 20(11) of the Interstate Commerce Act. Shortly after plaintiff

contacted C B & Q, the present defendant, Burlington Northern, Inc. succeeded to the interests of C B & Q. It was not until July 10, 1973 that the declination was reasserted. (40). Plaintiff instituted this action less than one year later. (3).

Plaintiff urges that the Judgment of the District Court be reversed. Further, it asserts that there is nothing in the authorities relied upon by the District Court in its memorandum opinion that militates against the result urged by plaintiff.

B. A. Walterman Company v. Pennsylvania Railroad Company, 295 F. 2d 627 (6th Cir. 1961), has nothing to do with the case at bar. It holds merely: 1) that a verbal claim does not satisfy the bill of lading requirement that written claim must be filed with the carrier within nine months of the loss, and 2) that the carrier may not waive or be estopped to assert the requirements of the bill of lading, as to do so would constitute a prohibited discrimination. In the case at bar, written claim was made against the carrier within the time specified in the bill of lading, and the carrier is not being asked to waive any of the requirements of the bill of lading.

In Burns v. Chicago M. St. P. & P.R.R. Co., 192 F. 2d 472 (8th Cir. 1951), the pertinent issue was whether settlement negotiations and correspondence between plaintiff's attorneys and the railroad tolled the running of the limitation period. The Court held that they did not.

As noted earlier, plaintiff does not take exception to this holding. We contend, however, that the instant case is distinguishable. In Burns, plaintiff's attorneys advised the railroad that they had been instructed to institute suit, and went on to invite settlement negotiations, without instituting suit. The railroad responded by advising that the claim had previously been disallowed, and declined the claim again. The Court held that the running of the limitation period "could not be tolled by any subsequent negotiations between the parties such as are here revealed." 192 F.2d at 496.

Contrast Burns with the present case, where the plaintiff forebore from instituting suit because the carrier had advised the claimant that its claim had been withdrawn from the carrier's open account in error, i.e. that the claim was still open and was therefore not declined, and at all times treated the claim as still open and under investigation.

In Brewster v. Davis, 207 App. Div. 461 (4th Dept. 1924), the claimant filed his claim against the carrier some nineteen months after the claim arose, or about thirteen months too late for it to be a valid claim. The claim was declined by the carrier three times; at no time did the carrier give the slightest indication that the claim was anything but declined. Certainly a rule of law based on the facts of Brewster v. Davis cannot be applied to the case at bar.

Plaintiff contends that the issue in the case at bar is best stated -- and resolved -- by Chief Justice Smith of the Supreme Court of Mississippi, dissenting in L. M. Kirkpatrick Co. v. I.C.R. Co., 195 So. 692, 190 Miss. 157 (1940):

> The exact question for decision is not whether a railroad company may waive or extend the statute's limitation on the time within which actions under it must be brought, but whether a railroad company after having refused to pay a claim for damages to a shipper, when it doubts the justice of its refusal, or desires to investigate the matter further, has the right to withdraw its refusal and pay the claim or take the matter up again with the shipper; in other words, whether a refusal of a railroad company to pay such a claim is irrevocable. The statute does not expressly prohibit such a revocation and I find nothing in it or its purpose to justify a court in holding that such a prohibition appears by implication.
>
> It is true that the cancellation of such a refusal removes that which puts in motion the

statute's limitation on the time within which an action on the claim can be brought, but all parties interested therein are in the same position they would have been had the railroad not refused payment in the first instance but had held the claim for further consideration. Had this refusal not been withdrawn the appellant presumably would have brought this action within the stipulated time thereafter.

The delay in bringing it was brought about by affirmative action by the appellee and to now permit it to effectively plead this delay as a bar to the action does not square with my conception of honesty and fair dealing--with that which the statute was enacted to insure. 195 So. at 694-695.

POINT II

THE TOTALITY OF THE CARRIER'S CONDUCT SHOWS THAT PLAINTIFF'S CLAIM WAS DISALLOWED LESS THAN TWO YEARS BEFORE THE COMMENCEMENT OF THIS ACTION; THE ACTION IS THEREFORE NOT TIME-BARRED.

In a recent case, decided subsequent to the decision below in the instant case, the United States District Court for the District of Montana held that the two-year limitation period begins to run on the date when the carrier can be said, in light of the totality of its conduct, to have finally disallowed the claim.

The principal issue in that case, William A. Cordingley v. Allied Van Lines, 413 F. Supp. 1398 (D. Mont. 1976), was the same as that now before this Court. The relevant facts that framed this issue consisted, as they do here, of the letters between the carrier and the claimant. The correspondence in Cordingley took virtually the same course as did the correspondence in the present case: a declination by the carrier, a challenge to the declination by the claimant, and then statements from the carrier indicating that the claim was open and under investigation. The District Judge, when he set forth the facts in

Cordingley, placed great emphasis on this correspondence. As relevent to the case at bar, the facts were set forth as follows:

IX.

> Shortly after plaintiff learned of the loss, he filed a claim. On May 16, 1973, defendant, through its Customer Service Department, sent to plaintiff a letter reading:
>
> * * *
>
> Pertaining to the two antique mirrors, please be advised that under Rule 12 of the tariff rules and regulations 144C, which is approved by the Interstate Commerce Commission, these mirrors are classified as items of extraordinary value, which should have been listed on the bill of lading. Thus Allied Van Lines cannot accept any liability.
>
> * * *
>
> On June 20, plaintiff responded by letter which stated among other things:
>
> * * *
>
> Secondly, I do not see why I should not be reimbursed when one of your drivers burns up a load. I do not know what is meant by not having the items listed on the bill of lading. Mr. Cathcart was fully aware of their value as it was discussed a number of times.
>
> On July 17, defendant replied:
>
> I have requested additional information from various parties involved.
>
> Upon receipt of requested information, I shall be able to take further consideration regarding your claim.

I shall try to be in touch with
you within the very near future.

X.

This action was filed on June 27, 1975.

413 F. Supp. at 1400.

The defendant carrier in Cordingley took the position that its letter of May 16th was a disallowance of the claim, which disallowance could not be altered, modified or waived, and that the suit was therefore barred by the same limitation period now before this Court.

The District Judge disagreed. In his opinion, Judge Smith noted that the limitation period was authorized by Section 20(11) of the Interstate Commerce Act. He stated that the purpose of that section was to prevent the carrier from fixing unreasonably short limitation periods, and observed that the statute says only that the time for the limitation of an action shall not be less than two years from the carrier's written disallowance, although the statute does not define the term "disallowed". Neither does the statute prescribe any period within which the carrier must allow or disallow a claim. Judge Smith observed from this that the carrier is thus free to

fix the period when the limitation begins to run. He then emunciated the rule he would adopt in the case:

> Under these circumstances, it seems to me that the rule should be - and that is the core of this opinion - that the statute begins to run on that date when the carrier can be said, in light of the totality of its conduct, to have finally disallowed the claim. 413 F. Supp. at 1401.

The District Judge then disclosed the considerations which led to his adoption of this rule:

> I think that any other rule is unjust. When the carrier sent its letter of July 17, (above quoted), it certainly led the plaintiff to believe that the claim was not disallowed and that there was no necessity at that time to consider a lawsuit. As of July 17, unless the carrier was being deliberately deceptive (and I do not intimate such), both parties believed that the claim was still open. Whether the action was deliberate or not, the plaintiff was misled by an act of the defendant, and the carrier ought not, as a matter of simple justice, be allowed to benefit from that act.
>
> Under the facts here, the plaintiff had no reason to believe, as of July 17, 1972 (the date of defendant's reconsideration letter), that his claim would not be paid. Did Congress intend that there be some technical triggering of the running of a limitations period without regard to the intentions of either

> party? Or did it intend that the shipper, as a reasonably prudent person, should have two years to start his suit after he knew that he would not be paid? Since the language was put in the statute for the benefit of the shipper, I would think the latter. 413 F. Supp. at 1402.

The correspondence in the instant case followed virtually the same pattern as that in Cordingley. However, the facts of the instant case present a much stronger case for the result reached in Cordingley, than did the facts of that case. If the carrier's letter of July 17th in Cordingley led the plaintiff therein to believe that its claim was not disallowed and that there was no necessity at that time to consider a lawsuit, the series of letters from Penn Central in the instant case would certainly have that effect on the plaintiff herein. Furthermore, the series of letters from Penn Central in this case demonstrate not only that the claimant was justified in believing that its claim was open, but also that the carrier was treating it as open. At no time in Cordingley did the carrier make a statement as unequivocal as Penn Central's representation that "Claim was withdrawn from open account in error....we will finalize within 30 days." (35).

The claimant continued to press the carrier for settlement (36, 37), but the carrier still had not finalized the claim when it wrote, over a year later, that it had urgently requested the return of the papers from its Assistant General Counsel, and that it would advise the claimant upon receipt. It also apologized for the delay. (38). How can the carrier assert that the running of the limitation period was started by its letter of more than two years and six months earlier? Why was it still corresponding with the claimant when, according to the position its successor-in-interest would later take, the claim had already been barred by the two-year limitation period? To quote Judge Smith in Cordingley:

> Unless the carrier was being deliberately deceptive..., both parties believed that the claim was still open. Whether the action was deliberate or not, the plaintiff was misled by an act of the defendant, and the carrier ought not, as a matter of simple justice, be allowed to benefit from the act. 413 F. Supp. at 1402.

To allow a technical triggering of the limitation period by the carrier's letter of January 20, 1970, in light of all that followed, surely could not have been intended by Congress when it drafted Section 20(11) of

the Interstate Commerce Act. When a claimant receives a declination that has no merit under the prevailing law, as was received by the claimant herein, it is both common practice and good sense for the claimant to question the basis of the declination in a letter to the carrier, and not to immediately file suit. In the instant case, claimant merely pointed out to the carrier that the basis for the carrier's declination was without merit and urged the carrier to reconsider. That the carrier was once again treating the claim as open is established by the correspondence.

The Seventh Circuit Court of Appeals, in John Morrell & Company v. Chicago, Rock Island and Pacific Railroad Company, 495 F. 2nd 331 (1974) faced the same issue now before this Court. The facts of Morrell were substantially similar to those of Cordingley and the instant case. The result in Morrell was the same as that in Cordingley, and the same as that urged by appellant herein, i.e. plaintiff's action was allowed to proceed, although instituted more than two years after the defendant carrier's first letter of declination.

Although the result in Morrell was the same as that in Cordingley, Judge Smith did not base his opinion on Morrell. The result in Morrell was based upon a characterization by the District Judge in that case of the declination letter as a qualified disallowance, which the District Judge, and the Seventh Circuit, regarded as insufficient to start the running of the limitation period.

Although the reasoning of Morrell is somewhat tenuous, appellant contends that the result is correct and equitable under the facts of that case. In Morrell, the characterization of the declination as qualified, was reached by viewing the correspondence subsequent to the declination. The Court decided that in view of such correspondence the parties could not have viewed the first declination letter as a final disallowance. The Trial Judge therefore found that the letter was a qualified disallowance, and held that this was insufficient to start the running of the limitation period. As a result, plaintiff's action was held not to be time-barred.

Applying the totality of conduct test enunciated in Cordingley, the Court in Morrell would have reached the same result without resorting to an arbitrary characteri-

zation of the declination letter as qualified. Appellant urges the adoption of the "totality of conduct" approach in the case at bar. Applying this test to the facts at bar, it is clear that plaintiff's claim was disallowed less than two years prior to the institution of this action, and that this action is not time-barred. This is clearly the proper result herein. Not only is it in accord with the two most recent Federal Court decisions in cases involving similar facts, but it would lead to the adoption of

> ...a rule which permits mistakes to be corrected, which encourages the settlement of claims short of litigation, which prevents a carrier, inadvertently or otherwise, from misleading the shipper, and which accomplishes rather than thwarts the will of Congress. William A. Cordingley v. Allied Van Lines, 413 F. Supp. 1398, 1402.

CONCLUSION

Appellant has shown in Point I of this brief that the carrier in this case revoked or withdrew its declination, stopping the running of the two-year limitation period, and that plaintiff's claim was therefore not time-barred.

Appellant has shown in Point II that when the defendant's conduct is viewed in its totality, it is clear that plaintiff's claim was disallowed less than two years before this suit was brought in the District Court, and that both parties were treating this claim as open more than two years after the purposed disallowance.

For the foregoing reasons, appellant respectfully urges this Court to find that plaintiff's suit was not time-barred and to reverse the judgment of the District Court.

Respectfully submitted,

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Service of ~~three~~ (2) copies of the within Brief
is admitted this 22nd day of Nov. 1976

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Defendant - Appellee